139

(3)

No. 09-62

Supreme Court, U.S.
FILED
SEP 2 - 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

FLOYCE REED PEYTON,

Petitioner,

v.

FRED'S STORES OF ARKANSAS, INC.,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

RICHARD H. MAYS
Counsel of Record for Petitioner
P. O. Box 1450
Heber Springs, AR 72543
(501) 362-0055

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
A. THE ISSUE IN THIS CASE IS WHETHER TEMPORARY MEDICAL LEAVE MAY BE A REASONABLE ACCOMMODATION, AS FRED'S NEVER ALLOWED PETITIONER THE OPPORTUNITY TO REQUEST AN ACCOMMODATION, AND SHE NEVER REQUESTED INDEFINITE LEAVE.....	2
B. PETITIONER RAISED PEYTON'S MENTAL CONDITION IN THE DISTRICT COURT AND EIGHTH CIRCUIT.....	6

TABLE OF AUTHORITIES

Page

CASES

Cehrs v. Northeast Ohio Alzheimer's Research Ctr., 155 F.3d 775 (6th Cir. 1998)..... 6

García-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000) 6

Peyton v. Fred's Stores of Ark., 561 F.3d 900 (8th Cir. 2009)..... 7

Rascon v. U. S. West Commc'ns, Inc., 143 F.3d 1324 (10th Cir. 1998)... 5

Walsh v. United Parcel Services, 201 F.3d 718 (6th Cir. 2000)..... 4-5

Watkins v. J & S Oil Co., 164 F.3d 55 (1st Cir. 1998)..... 5

STATUTES

Americans With Disabilities Act of 1990, 42 U.S.C. §12101 *et seq*..... 1

INTRODUCTION

In its response, Respondent, Fred's of Arkansas ("Fred's") mischaracterizes both the issue of the case and the arguments presented by Petitioner, Floyce Reed Peyton ("Peyton"). The question the Court should consider in this case is whether a temporary medical leave of absence may be a reasonable accommodation under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA") if the accommodation does not place an unfair burden on the employer – a question which the circuit courts of appeals answer inconsistently. By resolving the split among the circuits concerning this issue, the Court can clarify the rights to an entire class of people the ADA intended to protect.

Respondent attempts to frame the issue as whether an *indefinite* leave is a reasonable accommodation under the ADA, but this view suggests Fred's allowed Peyton a reasonable opportunity to request an accommodation, and that Peyton requested an indefinite leave. Neither assertion warrants merit, as Fred's fired Peyton without allowing her an opportunity to request an accommodation, and Peyton never requested an indefinite leave. Furthermore, in its attempt to claim no circuit split exists, Respondent cites cases distinguishable from the factual situation in this case.

Respondent also claims Peyton presents, here for the first time, the argument that she was medicated and failed to understand the significance of Fred's question

regarding accommodation. That simply is not true. The fact Peyton was medicated is not a standalone argument, but a fact supporting the argument Fred's never allowed Peyton an opportunity to request an accommodation. Petitioner clearly raised this argument in both the district court and the Eighth Circuit, as shown below.

The Court should grant certiorari to decide this important question affecting an entire class of disabled people and settle the split among the circuits by reversing the Eighth Circuit.

A. THE ISSUE IN THIS CASE IS WHETHER TEMPORARY MEDICAL LEAVE MAY BE A REASONABLE ACCOMMODATION, AS FRED'S NEVER ALLOWED PETITIONER THE OPPORTUNITY TO REQUEST AN ACCOMMODATION, AND SHE NEVER REQUESTED INDEFINITE LEAVE.

Respondent repeatedly frames the issue of this case as whether an *indefinite* leave is a reasonable accommodation under the ADA. *See* Br. in Opp. 5. But, unlike the cases cited by Respondent, Fred's denied the Petitioner in this case any opportunity to request an accommodation, firing her before she had a chance to ask. Therefore, the issue in this case is not one of indefinite leave, as Petitioner never asked for an indefinite leave; the issue is whether a temporary medical leave (which Petitioner would have requested had she not been terminated before she had the

opportunity) may be a reasonable accommodation under the ADA if the accommodation does not create an unfair burden on the employer.

It is important to bear in mind that, in the case involved in this proceeding, Fred's terminated Peyton *within two days of surgery* for her cervical cancer, while she was still hospitalized, and without having been provided *any* accommodation, such as time to speak to her physician about the length of her convalescence and when she might be able to return to work, let alone the opportunity for a short convalescence before returning to work. Now, Fred's relies on Petitioner's failure to give it a definite time period of absence virtually immediately after surgery as a defense. This argument rebels against common sense and ordinary decency, as well as the spirit of the ADA. *See* Pet. 20. Had Fred's allowed Petitioner a reasonable period after surgery to discover what accommodation she needed, a defined period of leave would have been requested; however, Fred's fired a pre-emptive strike, terminating Petitioner before it would have to provide her with a reasonable accommodation. If this were permissible conduct, any employer could terminate an employee immediately upon the employee's becoming ill or injured, without fear of violating the ADA.

This factual situation distinctly contrasts with the cases Respondent cites suggesting the issue is one of indefinite leave, and that no circuit split exists. The First, Third, Sixth, Ninth, and Tenth Circuits have

all held a temporary medical leave may be a reasonable accommodation under the ADA. Pet. 23-24. In claiming these circuits have ruled differently, the Respondent cites two unpublished cases and three other cases factually distinguishable from this case. Br. in Opp. 5-9. In each of these cases employers provided the employee with ample time and opportunity to request a defined period of absence. In fact, in most of the cases cited by Respondent, the employer allowed the employee an extended period of leave, and only terminated the employee when the employee failed to provide any timetable of how much additional leave was needed.

In *Walsh v. United Parcel Services*, 201 F.3d 718 (6th Cir. 2000), a case cited by the Respondent as analogous to this case (Br. in Opp. 7), the court detailed the extremes to which the employee had been previously accommodated when the court declined to declare the additional leave requested by the employee as a reasonable accommodation:

> In this case, plaintiff knew of his injury for years, was on salary continuation for a year, and unpaid medical leave for five months before being terminated. As noted above, even the last medical evaluation which defendant received from a homeopathic physician, months after the deadline set by the defendant, only contained a vague estimate of the date that plaintiff could return to his job as a pilot, placing it at one to three years in the future.

Walsh, 201 F.3d at 726-27. *See also Watkins v. J & S Oil Co.*, 164 F.3d 55 (1st Cir. 1998) (relying on employee's failure to request any accommodation in a situation where the employee was on leave for a two month period, and had three discussions with the employer during that time); *Rascon v. U S West Commc'ns, Inc.*, 143 F.3d 1324 (ruling a temporary medical leave a reasonable accommodation when the employee asked for a an additional four months of leave after he had already taken nearly five months of leave, and only mentioning the existence of the rule against an indefinite leave in some circuits).

While some of the above circuits held that the employer was not required, for ADA purposes, to provide what amounted to an indefinite leave, those facts are not in the least way apropos to those in the case now before the Court. The lack of cases presenting a situation where an employer fired a disabled employee immediately upon the onset of the disability without allowing the employee any reasonable opportunity to request an accommodation, such as occurred in this case, evidences the rarity and outrageousness of Fred's actions.

As the cases cited by Respondent rebutting the presence of a circuit split address a different factual scenario and a different issue altogether,[1] this Court should

[1] Although the issue in this case is broader than what Respondent suggests, there is also authority suggesting disagreement among the circuits on the issue of

grant certiorari to settle the split among the circuits as illustrated in the Petition for Writ of Certiorari. *See* Pet. 22-26.

B. PETITIONER RAISED PEYTON'S MENTAL CONDITION IN THE DISTRICT COURT AND EIGHTH CIRCUIT.

Throughout this case, both in the district court and the Eighth Circuit, Petitioner consistently raised the fact that Peyton was medicated and not fully alert during her communications with Respondent following surgery. In its brief, Respondent asserts that Petitioner claims for the first time in this Court that she did not understand the significance of questions asked by Fred's district manager during a brief telephone call to Peyton while in her hospital bed. This is not a new argument at all, as demonstrated by the record below.

In the district court, the Brief in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment shows Petitioner asserted this argument from the

---

indefinite leave. *See García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d (1st Cir. 2000) 638, 648 ("An unvarying requirement for definiteness again departs from the need for individual factual evaluation."); *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 782 (6th Cir. 1998) ("Upon reflection, we are not sure that there should be a *per se* rule that an unpaid leave of indefinite duration (or a very lengthy period, such as one year) could never constitute a 'reasonable accommodation' under the ADA.").

beginning: "Defendant did not and could not have engaged in any meaningful interactive process to determine accommodations with Peyton by telephone while she lay in an altered mental state in a hospital bed." Record 92.

The brief further states this argument:

> The Plaintiff did not request an indefinite leave of absence. In fact, Peyton had not missed much work at all at the time she was terminated. She provided her employer with the only medical documentation she had in her possession on January 9, 2006. She was terminated before she could provide a more definite statement from her cancer physician.

Record 93.

Petitioner once again presented this argument in her appeal to the Eighth Circuit. In fact, that court mentioned Petitioner's altered mental state in its recitation of the facts: "she was under the influence of pain medication and had no recollection of any question or discussion pertaining to accommodation." Pet. at App. 4.

Peyton also maintained this argument in her brief to the Eighth Circuit. "Peyton was under the influence of pain medication . . . . Peyton does not recall any discussion of accommodation." Appellant's Br. at 8.

The single line Respondent refers to in the petition (Br. in Opp. 4) was merely a recitation of the facts consistent with the

arguments made in the lower courts, not a new standalone argument raised for the first time.

The fact remains that Fred's fired Peyton before she had any reasonable opportunity to discover what accommodation she needed and relay that information to the respondent.

* * * * *

For the foregoing reasons, and those mentioned in the Petition for a Writ of Certiorari, the petition should be granted.

Respectfully submitted,

RICHARD H. MAYS
Counsel of Record for Petitioner
MAYS & WHITE, PLLC
115 South Third St. - Suite 2
P.O. Box 1450
Heber Springs, AR 72543
(501) 362-0055